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7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA
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10 UNITED STATES OF AMERICA,) 3:13-cr-00011-HDM-WGC
11 Plaintiff,)
12 vs.) ORDER
13 BYRON TRENT DAVIS,)
14 Defendant.)
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16 On January 20, 2015, the court granted the government's
17 application for an order deeming the attorney-client privilege
18 waived and ordered:

19 The attorney-client privilege between defendant and
20 former counsel Mary Boetsch is waived for the purposes of
21 proceeding as to all contentions raised in defendant's
22 motion. Ms. Boetsch shall provide the government with an
affidavit or declaration, as well as any relevant
materials and information, addressing the allegations and
matters raised in defendant's motion on or before
February 20, 2015.

23 On February 25, 2015, after receiving an untimely opposition
24 from the defendant, the court reaffirmed its order, noting that it
25 "granted waiver of the privilege only as necessary to address the
26 contentions of defendant's petition" and thus the waiver was
27 "sufficiently narrowly drawn." (Ord. Dated Feb. 25, 2015).

28 On March 19, 2015, defendant filed a motion to reconsider and

1 vacate the order of February 25, 2015. In the motion defendant
2 argues that: (1) the court lacked jurisdiction to order discovery
3 because the government's motion did not make the requisite showing
4 under Rule 6(b) of the Rules Governing Section 2255 Proceedings;
5 (2) the court's order was overly broad and contained no provision
6 to balance a legitimate need for discovery with the actual
7 potential for prejudice; and (3) the court's order deprived
8 defendant of his "due process right pursuant to 28 U.S.C. § 2255(b)
9 to have the Court determine within a reasonable time whether the
10 2255 Motion and supplemental Brief proved conclusively that he was
11 entitled to no hearing." (Doc. #66 at 2).

12 Under Rule 6(b), a "party requesting discovery must provide
13 reasons for the request. The request must also include any
14 proposed interrogatories and requests for admission, and must
15 specify any requested documents." Defendant argues that the
16 government's motion was deficient because it did not provide any
17 reasons for the request and did not include proposed
18 interrogatories, requests for admission or specific requested
19 documents. Thus, he argues, the court order granting discovery of
20 "any relevant materials and information" was improper.

21 The government's motion identified defendant's ineffective
22 assistance of counsel claims as the reason it needed to obtain
23 information from former counsel Mary Boetsch and specifically
24 sought from former counsel Mary Boetsch an affidavit or
25 declaration. Defendant raises multiple claims of ineffective
26 assistance of counsel, many of which rest directly on
27 communications he had with counsel and decisions counsel made
28 regarding her representation of him. Accordingly, the government's

1 request for a declaration or affidavit from former counsel Mary
2 Boetsch complied with Rule 6(b), and good cause existed for the
3 court to authorize this discovery from former counsel Mary Boetsch.

4 However, the government's request did not provide a list of
5 other specific documents it sought from former counsel Mary
6 Boetsch, requesting instead "any relevant materials" in former
7 counsel Mary Boetsch's possession necessary to address the
8 defendant's contentions in his § 2255 petition.¹ Accordingly the
9 court's orders of January 20, 2015, and February 25, 2015, are
10 clarified by limiting their scope to the filing of the affidavit by
11 former counsel Mary Boetsch as requested by the government. Should
12 the government seek to obtain and use in these proceedings any
13 other documents from former counsel Mary Boetsch, it shall submit a
14 request for specific documents in accordance with Rule 6(b). Any
15 documents other than the affidavit that have been obtained by the
16 government under the court's earlier orders of January 20, 2015,
17 and February 25, 2015, shall be returned to former counsel Mary
18 Boetsch and shall not be relied upon in these proceedings absent
19 further authorization of the court and shall not be distributed to
20 any third parties and shall not be used for any purpose other than
21 proceeding on defendant's § 2255 petition.

22 Defendant also appears to argue that discovery should not be
23 ordered until an evidentiary hearing is held. (See *id.* at 3:17-
24 20). He cites no authority for this proposition, which is in fact
25 contrary to the law. See Rules Governing § 2255 Proceedings Rule 6
26 adv. notes (incorporating advisory notes for Rules Governing § 2254

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28 ¹The government's request did not seek any interrogatories or requests
for admissions nor did the court order any.

1 Proceedings Rule 6, which recognize the court may order discovery
2 to determine whether an evidentiary hearing is necessary); *Jones v.*
3 *Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997) (“[D]iscovery is
4 available to habeas petitioners at the discretion of the district
5 court judge for good cause shown, regardless of whether there is to
6 be an evidentiary hearing.”). Defendant’s assertion that the court
7 must determine *now* whether he is entitled to an evidentiary hearing
8 is without merit. The court will determine whether an evidentiary
9 hearing is necessary once defendant’s petition is fully briefed.

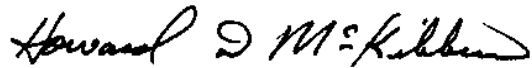
10 A “defendant impliedly waives his attorney-client privilege
11 the moment he files a habeas petition alleging ineffective
12 assistance of counsel.” *Lambright v. Ryan*, 698 F.3d 808, 818 (9th
13 Cir. 2012). While defendant is correct that the waiver must be “no
14 broader than needed to ensure the fairness of the proceedings
15 before it,” *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir.
16 2003), and that the court “*must* enter the appropriate orders
17 clearly delineating the contours of the limited waiver before the
18 commencement of discovery and strictly police those limits
19 thereafter,” *Lambright v. Ryan*, 698 F.3d 808, 818 (9th Cir. 2012),
20 the court’s orders of January 20, 2015, and February 25, 2015,
21 complied with these mandates. Under those orders, the waiver was
22 limited in scope to communications and materials necessary to
23 address the defendant’s contentions in his § 2255 petition, which
24 consists almost entirely of ineffective assistance of counsel
25 claims. The orders stated the purpose of the waiver was to proceed
26 on defendant’s § 2255 petition. As previously stated, the
27 defendant’s attorney-client privilege with former counsel Mary
28 Boetsch has been waived only as necessary to address the

1 allegations of ineffective assistance of counsel raised in
2 defendant's § 2255 petition and no further. In addition, any
3 information obtained from this waiver, including the information
4 contained in former counsel Mary Boetsch's affidavit, may be used
5 only in these § 2255 proceedings and for no other purpose.

6 The court having clarified its orders of January 20, 2015, and
7 February 25, 2015, the motion to reconsider and vacate (#66) is
8 **DENIED.** The affidavit of Mary Boetsch filed on March 19, 2015,
9 (Doc. #64-1 & Doc. #65) is hereby unsealed.

10 IT IS SO ORDERED.

11 DATED: This 10th day of April, 2015.

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14 UNITED STATES DISTRICT JUDGE
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